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No. 87-986

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

DONALD DOUGLAS BREIER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF UNITED STATES SENATOR JAMES A. McCLURE AND UNITED STATES REPRESENTATIVES HAROLD VOLKMER, LARRY CRAIG, AND RON MARLENEE

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TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	7

TABLE OF AUTHORITIES

Cases: Page

United States v. Breier, 813 F.2d 212 (9th Cir. 1987), *reh'g den.*, —— F.2d —— 4, 5

Statutes:

Firearms Owners' Protection Act, Pub. L. 99-308, 100 Stat. 449 (1986) 1, 3, 4, 5, 6
1 U.S.C. 109 ..... 2, 6
18 U.S.C. 921(a) 1, 4
18 U.S.C. 3282 5

Legislative Materials:

S. 1862, 96th Cong., 1st Sess. (1979) 2
S. 1030, 97th Cong., 1st Sess. (1981) 2
S. 914, 98th Cong., 1st Sess. (1983) 2, 5
S. 49, 99th Cong., 1st Sess. (1985) 2, 5
H.R. 5225, 96th Cong., 1st Sess. (1979) 2
H.R. 3300, 97th Cong., 1st Sess. (1981) 2, 3
H.R. 2420, 98th Cong., 1st Sess. (1983) 2, 3
H.R. 945, 99th Cong., 1st Sess. (1985) 2, 3
Gun Control and Constitutional Rights: Hearing before the Subcommittee on the Constitution of the Senate Committee on the Judiciary on Constitutional Oversight of a Regulatory Agency—the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury—on the Enforcement of the Gun Control Act of 1968, 96th Cong., 2d Sess. (1980) 4
Oversight Hearings on the Bureau of Alcohol, Tobacco and Firearms, Fiscal Year 1980, before the Senate Committee on Appropriations, 96th Cong., 1st Sess. (1979) 4
Senate Report No. 98-583, 98th Cong., 2d Sess. (1984) 5

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STATEMENT OF INTEREST OF AMICI CURIAE

This case presents the question of the applicability of an amendment to 18 U.S.C. 921(a) made by the Firearms Owners' Protection Act (FOPA), Pub. L. 99-308, 100 Stat. 449 (1986), to a case pending in the federal courts after the effective date of the FOPA but which arose from acts committed prior to that date. More broadly, this case presents to this Court an opportunity

to determine the degree to which congressional intent in enacting amendments to penal statutes nullifies the effect of the federal general saving provision, 1 U.S.C. 109.

United States Senator James A. McClure is the senior senator from Idaho. In 1979, he introduced S. 1862 (96th Cong., 1st Sess.), the initial version of the bill which ultimately became the FOPA. As S. 1862 was not acted on by the 96th Congress, Senator McClure subsequently introduced revised versions of the bill in the 97th (S. 1030), 98th (S. 914), and 99th (S. 49) Congresses, culminating in the enactment of S. 49 as the FOPA by the 99th Congress. As the primary Senate sponsor of the FOPA, Senator McClure is acutely concerned with the interpretation, application, and implementation of the FOPA by the judicial branch. Moreover, as an attorney well-versed in statutory construction, Senator McClure believes that this Court will benefit from his analysis of the FOPA. Finally, as a member of Congress concerned with the enactment of penal statutes generally, Senator McClure has a genuine interest in seeing this Court settle the effect of the general saving provision.

United States Representative Harold Volkmer was the chief sponsor of the series of bills which ultimately became the FOPA. The initial version of the bills was H.R. 5225 (96th Cong., 1st Sess.), introduced by Representative Volkmer in 1979; this was followed, in 1981, by H.R. 3300 (97th Cong., 1st Sess.), in 1983, by H.R. 2420 (98th Cong., 1st Sess.), and finally, in 1985, by H.R. 945 (99th Cong., 1st Sess.). As the chief sponsor of the FOPA, Representative Volkmer has a particular interest in the construction and application of its provisions. And, like Senator McClure, Representative Volkmer, as an attorney, believes that this Court can benefit from his analysis of the FOPA and the general saving provision.

United States Representatives Larry Craig and Ron Marlenee were co-sponsors of H.R. 3300 (97th Cong., 1st Sess.), the companion bill to S. 1030, the second version of what ultimately became the FOPA; they were also co-sponsors of revised versions of H.R. 3300 introduced in the 98th (H.R. 2420) and 99th (H.R. 945) Congresses. As leading proponents in the House of Representatives of the reforms made by the FOPA, Representatives Craig and Marlenee have a special interest in the judicial branch's interpretation, implementation, and application of the FOPA. Moreover, Representatives Craig and Marlenee, as members of Congress, have a significant interest in having this Court clarify the status of the general saving provision.

Amici curiae fully recognize that after-the-fact "legislative history" should not be given weight by the federal courts; thus, this brief is not, and is not intended to be, a presentation of after-the-fact legislative history, but rather a legal analysis of the FOPA intended to benefit the Court's analysis of the need to grant Breier's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The argument of *amici curiae* may be very briefly summarized as follows: that the congressional findings in § 1(b) of the FOPA, in conjunction with the language of the effective date provisions of the FOPA, as well as the evidence of intent found in the Judiciary Committee reports, indicate an intent on the part of Congress that the amendments made by the FOPA should apply to all cases pending on the FOPA's effective date.

ARGUMENT

In its opinion in *United States v. Breier*, 813 F.2d 212 (9th Cir. 1987), *reh'g den.* —— F.2d ——, the Ninth Circuit dealt with the applicability of the FOPA to cases brought pursuant to 18 U.S.C. 921(a) which were pending on November 15, 1986, the effective date of the FOPA, and held that amendments made by the FOPA did not apply to cases which had arisen prior to the FOPA's effective date but were pending after that date. In so doing, the Ninth Circuit seriously misconstrued the intent of Congress.

The intent of Congress in enacting the FOPA was plainly set forth in § 1(b), in which Congress found that additional legislation was required "to *correct* existing firearms statutes and enforcement policies" and "to reaffirm the intent of the Congress, as expressed in Section 101 of the Gun Control Act of 1968. . . ." (emphasis added).[1] This finding reflected Congress' concern, derived from several Senate Judiciary and Appropriation Committee hearings[2] that the Gun Control Act of 1968 had become a tool for abusive enforcement practices by

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[1] The intent of Congress as expressed in § 101 of the Gun Control Act of 1968, which the FOPA sought to reaffirm and thus revitalize, was that "it was not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes."

[2] See, Gun Control and Constitutional Rights: Hearing before the Subcommittee on the Constitution of the Senate Committee on the Judiciary on Constitutional Oversight of a Regulatory Agency—the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury—on the Enforcement of the Gun Control Act of 1968, 96th Cong., 2d Sess. (1980); Oversight Hearings on the Bureau of Alcohol, Tobacco and Firearms, Fiscal Year 1980, before the Senate Committee on Appropriations, 96th Cong., 1st Sess. (1979).

the Bureau of Alcohol, Tobacco, and Firearms and that a legislative remedy was called for. At those hearings "[m]ost of the public witnesses who testified repeated the *urgent* need for changes in current law to prevent the recurrence of abuses documented in detail . . . ." (emphasis added) Report of the Senate Committee on the Judiciary, Report 98-583, 98th Cong. 2d Sess. (1984), at 3.[3]

Yet, if the Ninth Circuit's view of the applicability of the FOPA is correct, congressional intent will plainly be thwarted and the very purpose of the FOPA, as expressed by § 1(b) and the Judiciary Committee, would be largely negated. This is because the FOPA will not have full effect until November 15, 1991 because, until that date, prosecutions under the Gun Control Act of 1968 as it existed prior to the enactment of the FOPA, could continue to be brought given that the statute of limitations is five years. See 18 U.S.C. 3282.

The effective date provision of the FOPA (§ 110) also compels the conclusion that Congress intended the FOPA to apply to all cases pending on November 15, 1986. In its opinion, the Ninth Circuit refers to § 110(b) as a provision "specifying which sections were to have retroactive effect", 813 F.2d at 215, and concludes that failure to include § 101 (the amendment to 18 U.S.C. 921(a) at issue in *Breier*) in the list of sections in § 110(b) "precludes the finding of an implied congressional intent of retroactivity" to § 101. 813 F.2d at 215. This erroneously interprets § 101(b). In fact, all that § 110 does is to establish an effective date for the three sections listed therein different, and earlier than, the effective date of the remainder of the law; it does not establish

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[3] This Report accompanied S.914 (introduced in the 98th Congress), the immediate predecessor of S.49. As S.914 was virtually identical to S.49 (the bill which became the FOPA), committee consideration of S.49 in the 99th Congress was unnecessary, and thus there was no report on S.49.

that the three listed sections are "retroactive" and that the remainder of the provisions of the FOPA are not. Indeed, the reason Congress expressly stated that the three listed sections were applicable to proceedings pending on the date of enactment of the FOPA was certainly its understanding, in view of § 1(b), that, on the effective date, all the amendments made by the FOPA would apply to all pending proceedings. Congress simply wished the three sections listed in § 110(b) to apply to pending proceedings earlier than the remainder of the provisions of the FOPA.

Finally, while not stated in so many words in the FOPA, the provisions of the FOPA should come within the exception to the rule established by the general saving provision, 1 U.S.C. 109. That exception states that the rule of § 109 does *not* apply to a repealing act which "expressly provide[s]" that the repeal of a statute shall "have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute . . . ." Congress' statement in § 1(b) regarding the need for additional legislation "expressly provide[s]" that the FOPA has "the effect to release or extinguish any penalty, forfeiture, or liability incurred under" the Gun Control Act of 1968. § 109 does not state that a repealing act must expressly "state" that it shall "have the effect to release or extinguish any penalty, forfeiture, or liability incurred," but rather states only that the repealing act must expressly so "provide," a broader term allowing Congress to express its intent by means other than specific statements in the repealing act.

CONCLUSION

This Court should grant Breier's Petition for a Writ of Certiorari.

Respectfully submitted,

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February, 1988